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No. 96-370

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
*Petitioner,*
v.
FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AND THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

On November 18, 1996, this Court granted the National Coordinating Committee for Multiemployer Plans' (the "NCCMP") Motion for Leave to file an *amicus* brief in support of the Petition for Certiorari in this case. A separate Motion filed by the Central States, Southeast and Southwest Areas Pension Fund ("Central States") was also granted. Respondents have refused consent to the above *amici's* continued participation in this appeal. Therefore, pursuant to Rule 37 of the Rules of this Court, the NCCMP and Central States respectfully move this Court for leave to file the accompanying joint *amicus* brief, in which we urge the Court to reverse the decision below. Letters granting and refusing consent have been filed with the Clerk of the Court.

## INTEREST OF THE NCCMP AND CENTRAL STATES

The NCCMP is a nonprofit, tax-exempt organization that was formed after the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA") to participate in the development of employee benefits legislation and government regulations promulgated to implement ERISA and other laws affecting multiemployer plans. Currently, more than 240 multiemployer plans and related international unions, located in at least 37 states, are affiliated with the NCCMP. These affiliated plans represent a majority of participants in multiemployer plans throughout the nation and are representative of the multiemployer plan community generally.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to state the position of the trustees, participants, and beneficiaries of such plans. For this reason, the NCCMP frequently participates as an *amicus curiae* in this Court as well as in the various courts of appeals. With regard to withdrawal liability assessments under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), the NCCMP has represented the interests of multiemployer plans in *Concrete Pipe and Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993); *Connolly v. PBGC*, 475 U.S. 211 (1986); and *PMGC v. R. A. Gray & Co.*, 467 U.S. 717 (1984). The NCCMP also filed an *amicus* brief in *Board of Trustees of the Dist. No. 15 Machinists' Pension Fund v. Kahle Eng'g Corp.*, 43 F.3d 852 (3d Cir. 1994), which addressed the precise issue at bar. In addition, the NCCMP has been recognized as having had a "significant impact" on MPPAA by the Senate cosponsors of that legislation. *See* 126 Cong. Rec. S9835 (daily ed. July 24, 1980); 126 Cong. Reg. S10,100 (daily ed. July 29, 1980).

The Central States Pension Fund is the largest multiemployer defined benefit pension fund in the United States with assets of $14.473 billion. The plan covers 178,000 retirees currently drawing benefits, 217,000 active participants, and 69,000 vested inactive participants. At present, the Fund receives contributions from over 5,000 employers through over 9,000 billing accounts in 42 states and Canada. As of September 30, 1986, Central States had 305 outstanding assessments of withdrawal liability totalling approximately $267 million. Of these, 80 occurred in 1996 in the amount of $35 million. Since September 26, 1980, the effective date of MPPAA, the Fund has collected about $400 million in withdrawal liability. However, its vigorous collection efforts, which have been heretofore successful, have been recently undermined by the decision of the Ninth Circuit at bar and by the somewhat earlier decision of the Seventh Circuit, which conflicts both with that of the Ninth Circuit and with the sounder decisions of the District of Columbia and Third Circuits, *infra*.[1]

Due to its size, and long experience in enforcing MPPAA on behalf of the Fund's participants and beneficiaries, Central States, like the NCCMP, is able to bring a broad perspective to the issues raised in this case, in

[1] Central States has vested benefit liabilities of $16.524 billion, $2.051 billion in excess of its assets. The Fund's liability for unfunded vested benefits ("UVBs") is not immediately due because the liabilities represent the present value of benefits payable over decades into the future. The expected time to amortize the UVBs at current funding rates is about 29 years. The principal means for funding the UVBs, as well as current benefit accruals, is the contributions made by the employers pursuant to their collective bargaining agreements. However, substantial additional funding, as contemplated by Congress, comes from the Trustees' systematic and rigorous enforcement of MPPAA. The Ninth and Seventh Circuits' approaches have impermissibly curtailed the Trustees' ability to collect withdrawal liability; hence, resolution of the issues raised in this appeal are of critical importance to the Central States Pension Fund.

particular, with respect to the practical problems for national multiemployer plans generated by the present conflict among the circuits as well as the inherent difficulties of enforcing MPPAA within the time constraints imposed by the Courts of Appeals for the Ninth and Seventh Circuits.

For the reasons set forth in the accompanying brief, the NCCMP and Central States respectfully request this Court to clarify as fully as possible consistent with the facts of the conflicting decisions the operation of the 6-year statute of limitations applicable to actions to collect withdrawal liability.

Congress chose not to include a statute of limitations provision applicable to actions to collect delinquent contributions under Title I of ERISA. However, Congress did intend that a uniform 6-year limitations period would govern actions to collect withdrawal liability under Title IV of the statute. However, in spite of the text of Section 1451(a) and (f) of MPPAA's civil enforcement provision, this has not occurred, and there is substantial disarray and confusion among the courts. Moreover, in contrast to the Courts of Appeals for the District of Columbia and Third Circuits, both the Ninth and Seventh Circuits have construed MPPAA's limitations provision in a manner that is inconsistent with other specific provisions of the statute as well as with the structure and design of the statute as a whole. As a result, the time for bringing a collection action in those two jurisdictions has been impermissibly foreshortened, as has been the time within which trustees may exercise their statutory discretion whether or not to accelerate payment and demand the entire amount due.

The NCCMP and Central States are concerned that unless the Ninth and Seventh Circuits' approaches are rejected by this Court, in favor of the more flexible and reasonable approach taken by the Courts of Appeals for the District of Columbia and Third Circuits, MPPAA's statutory scheme for collecting withdrawal liability will be substantially undermined and the effectiveness of MPPAA reduced. In addition, the trustees' ability to encourage withdrawn employers to re-enter the plan under MPPAA's abatement rules will be substantially impeded unless they retain the statutory discretion not to declare a default and accelerate the debt within six years of the date of withdrawal (under the Ninth Circuit's reasoning) or within six years from the date the first installment payment was due and not paid (under the Seventh Circuit's presumptive acceleration approach).

Since the above results are inimical to the financial health of multiemployer pension plans, the NCCMP, on behalf of all affiliated pension plans, and the Central States Pension Fund, on behalf of its participants and beneficiaries, request leave to file a joint *amicus* brief on the merits in support of Petitioner.

In analyzing the conflicting circuit court opinions, *amici* will focus their discussion on why—for quite practical reasons—the single accrual dates selected, respectively, by the Ninth and Seventh Circuits, are unworkable and are likely to result either in a loss of plan assets or in the general 6-year limitations rule (Section 1451(f)(1)) being swallowed up by the discovery rule (Section 1451 (f)(2)), which will lead to inconsistency and skew the legislative balance between enforcement and repose which Congress intended.

Respectfully submitted,


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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AND THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

### PRELIMINARY STATEMENT

The National Coordinating Committee for Multiemployer Plans ("NCCMP"), joined by the Central States, Southeast and Southwest Areas Pension Fund ("Central States"), submits this *amicus* brief to urge the Court to reverse the decision of the Court of Appeals for the Ninth Circuit, in which the court ruled that the 6-year limitations period governing trustee actions to collect withdrawal liability begins to run from the date on which an employer withdraws from a multiemployer pension fund. Since a uniform limitations rule is of vital importance for multiemployer plans, many of which are large national plans having contributing employers and partici-

pants in many states,[1] we further urge the Court to resolve the conflict that presently exists among the other circuits by affirming the approach taken by the Courts of Appeals for the District of Columbia[2] and Third Circuits[3] and by rejecting the rationale adopted by the Court of Appeals for the Seventh Circuit.[4]

The NCCMP and Central States file this brief because we believe that the decision below as well as the Seventh Circuit's *Navco* decision are inconsistent with the purpose and text of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 ("MPPAA"),[5] and that those decisions, unless repudiated by this Court, will seriously impede the ability of multiemployer plan trustees to recover withdrawal liability, as Congress intended. Additionally, we are concerned that unless the rulings of those courts are rejected, trustees will be hindered in exercising their congressionally authorized discretion to work with collective bargaining parties to bring about the re-entry of withdrawn employers into the

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[1] Central States has actual or potential withdrawal liability claims in 42 states and in each of the 11 numbered judicial circuits. In addition, each of the five largest contributing employers does business in virtually every judicial circuit. The conflict among the circuits raises a serious problem for multiemployer plans which, like Central States, cover operations in more than one federal judicial circuit. For example, which law would apply to a withdrawal from Central States? Because of MPPAA's broad venue provision (29 U.S.C. § 1451(d)), it could be the law where the plan is administered or where the employer resides or does business.

[2] *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989).

[3] *Board of Trustees of the Dist. No. 15 Machinists' Pension Fund v. Kahle Eng'g Corp.*, 43 F.3d 852 (3d Cir. 1994).

[4] *Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).

[5] Pub. L. 96-364, 94 Stat. 1208 (1980). All further references to MPPAA will be to Title 29, U.S.C.



plan in the interests of the plan's participants and beneficiaries.

For the reasons to be set forth below, the NCCMP and Central States therefore urge the Court to adopt the installment contract approach suggested by both the District of Columbia and Third Circuits and to rule (1) that trustees have six years from the date of each missed installment payment to file suit to collect that payment unless the trustees have exercised their statutory discretion to accelerate the debt; (2) that withdrawal liability cannot be presumptively or automatically accelerated; (3) that trustees are not required by MPPAA's 6-year limitations period to accelerate the debt within six years of the first missed installment or forever lose their right to collect the remainder of the debt; and (4) that if trustees do opt to accelerate the debt, at any point during the payment schedule, they are entitled to collect the entire amount of unpaid withdrawal liability reduced (at most) by installments which fell due more than six years prior to the date a lawsuit was filed to collect the accelerated debt.

## INTEREST OF THE NCCMP AND CENTRAL STATES

The NCCMP and Central States incorporate by reference the statement of interest set forth in the attached Motion.

Section 1451(a) of MPPAA permits a fiduciary who is aggrieved by an "act or omission" with respect to the plan to file an action for legal or equitable relief, or both. Section 1451(f)(1) requires such an action to be brought within six years of the date on which the cause of action arose. The issues to be resolved in this appeal are first, whether the limitations period begins to run when an installment payment is due rather than on the withdrawal date and, second, whether the limitations period runs separately as to each installment unless the remaining payments have been accelerated.

In the case at bar, the Ninth Circuit ruled that MPPAA's 6-year statute of limitations begins to run as of the date of withdrawal, rather than as of the date an employer fails to make a payment demanded by the trustees. This is incorrect because a plan cannot determine—as of the date of withdrawal—whether the employer has *any liability* as a result of the withdrawal and cannot assert a legal claim to payment as of that date.

Moreover, the date of withdrawal is itself an inappropriate triggering date as this date may itself be fraught with uncertainty (and is frequently a principal subject of an employer's request for administrative review and arbitration). As a significant amount of time is likely to elapse before a plan is able to confirm with reasonable certainty that a suspension of contributions is, in fact, coincident with a withdrawal as defined by statute, calculate the resulting liability (if any), prepare a payment schedule, and issue a notice and demand for payment, the Ninth Circuit's ruling results—for practical purposes—in trustees' having far less than six years to collect the scheduled payments or to declare a default and collect the accelerated debt. Additionally, because the statute of limitations is rigidly fixed on the date of withdrawal, the trustees—under the Ninth Circuit's approach—could risk losing all installments falling due six or more years after that date for any number of reasons; for example, if an employer initially makes its scheduled payments but then stops, knowing that the statute of limitations has run on the plan's claim for the balance and that it is also too late to declare a default and collect the accelerated debt.

In contrast to the Ninth Circuit, the Seventh Circuit has ruled that the limitations period begins to run from the date of the first missed payment demanded by the plan sponsor. However, in selecting a single triggering date, the Seventh Circuit, like the Ninth Circuit, failed to give proper weight to the fact that MPPAA requires plans to permit employers to make installment payments for up to 20 years and also gives trustees total discretion



whether or not to declare a default and accelerate the debt as a result of the employer's failure to make a scheduled installment payment. Additionally, both courts have failed to consider that a governing Pension Benefit Guaranty Corporation ("PBGC") regulation prohibits acceleration pending administrative review and arbitration, *infra*.

Although various provisions of MPAA contemplate two distinct types of claim-accrual dates—one to collect missed installments and one to collect the accelerated debt (upon notice of default)—the Seventh Circuit found that pension plans can assert only *one* claim against withdrawn employers; namely, for the *full* amount of withdrawal liability. The court reasoned that even if a plan may permit an employer to amortize the debt over as long as 20 years, the entire debt is presumptively due at the outset. Thus, the trustees' cause of action arises only once—on the date the first installment is missed. Consequently, a fund has only six years from that date in which to file an action to collect unpaid installments or to accelerate the debt and collect the entire amount due. (Alternatively, the decision can be read to mean that a first missed installment automatically accelerates the debt.) Although the Seventh Circuit's approach differs from the Ninth Circuit's in that the triggering date is different, both decisions suffer from the same defect because they render meaningless MPPAA's 20-year installment payment cap; ignore the regulatory restraint on acceleration; and eliminate the trustees' discretion to determine whether and when to declare a default and accelerate the debt following or in the absence of review or arbitration.

A third (and much sounder) approach has been taken by the Courts of Appeals for the District of Columbia and Third Circuits, in recognition that Congress made a reasoned determination that plans would be most likely to collect a withdrawal liability debt if employers had sufficient time to pay it; and that practical and legal constraints exist with respect to the ability of trustees to

declare a default and to accelerate the debt. Under both courts' approach, a plan's claim accrues only when an employer fails to meet a demand for payment to which the plan is entitled. Accordingly, a cause of action would arise each time an employer fails to make a scheduled installment payment and the trustees would also have six years from each such date to collect the amount due. Under that rationale, although not decided, the trustees would also have six years from the date the accelerated payment was due (following a notice of default) in which to file an action for the accelerated debt and thus to collect all future payments as well as all installments falling due within the 6-year period prior to filing the complaint. The NCCMP and Central States endorsed this approach, respectively, in *Kahle* and *Navco, supra,* and continue to believe that the reasoning of the District of Columbia and Third Circuits reflects a correct reading of the statute.

The NCCMP and Central States are concerned that if either the Ninth Circuit's or the Seventh Circuit's approach is adopted, the statutory scheme for collecting withdrawal liability will be substantially undermined and the effectiveness of MPPAA reduced. We therefore urge rejection of both courts' approaches, which are predicated on a single and incorrect claim-accrual date and fail to take into account the practical realities in which multiemployer plans operate.

## SUMMARY OF ARGUMENTS

1. The date of withdrawal is of no significance with respect to determining when a cause of action to collect withdrawal liability arises. The "act or omission" by which a multiemployer plan is harmed for purposes of applying the 6-year limitations period to collections is not the "act of withdrawal," as an employer can meet the statutory criteria for withdrawal but incur no liability as a result of MPPAA's *de minimis* rule or a statutory exemption. For this reason, a cause of action to *collect* withdrawal liability cannot occur before the trustees have



determined that an employer's withdrawal has resulted in liability, and the employer fails to pay it. This is structurally reflected in the fact that Section 1383(e) defines the date of a complete withdrawal only for purposes of Part 1 of the statute, whereas MPPAA's civil enforcement provision is located in Part 6.

Second, the Ninth Circuit's "date of withdrawal" approach fails to take into account the practical realities in which multiemployer plans operate, and thereby injects uncertainty into a determination that should be reasonably clear to trustees and employers alike, as they weigh their rights and obligations under MPPAA. As the District of Columbia Circuit recognized, the date of withdrawal would be "unwieldy" as an accrual date because it is often very difficult and time-consuming for trustees to determine whether there has been a *permanent* cessation of the obligation to contribute or of covered operations—not only in the construction industry but in other industries as well. Moreover, by the time the date of withdrawal is ascertained (whether during the pre-assessment phase or, if disputed by an employer, in arbitration), the trustees' claim may well be barred. Although courts could extend the general 6-year limitations period by applying the discovery prong of Section 1451(f)(2), the discovery rule was not intended to govern routine collection actions and could increase—not reduce—litigation issues, as the parties dispute who knew or should have known what and when. Inevitably, such a practice would lead to inconsistent results so that the 6-year limitations period which Congress adopted for collection actions under Title IV of ERISA would cease to reflect the legislative balance between enforcement and repose.

2. In ruling that the 6-year limitations period begins to run on the date of withdrawal, the Ninth Circuit disregarded two specific provisions of MPPAA and underestimated the time a plan actually needs to determine whether a withdrawal has occurred and then to prepare a payment schedule. The difficulty of determining whether

an employer has withdrawn or is entitled to a statutory exemption is compounded by the requirement that trades or businesses under common control must be treated as a single employer under highly complex and technical rules which depend for their efficacy on the *employers'* providing requisite information. Knowing of these difficulties, Congress did not require plans to assess or collect withdrawal liability as of the date of withdrawal. Rather, Section 1399(b)(1) requires plan sponsors to notify employers of their withdrawal "as soon as practicable" after that date, while Section 1399(c)(2) requires payment no later than 60 days *after* the notice and demand. If trustees issue a premature notice and demand without having made a sufficient inquiry, they risk an injunction against the assessment, as well as sanctions. However, if they undertake the type of careful analysis Congress intended when it gave the trustees' determinations a presumption of correctness (a presumption upheld by this Court), they risk a substantial foreshortening of their enforcement rights. That payment schedules commonly exceed six years is evidenced by the fact that MPPAA itself forgives only those installments due after the *first 20 years*.

Moreover, employers could manipulate the limitations period to deprive plans of most of the liability owed. For example, an employer could comply with the payment schedule *only* until the 6-year period has expired and then stop or could cure any outstanding delinquencies arising within the limitations period so as to preclude acceleration of the debt before the trustees' "single" claim expires. These and other problematic results which are generated by a single accrual date (and therefore by both the Ninth and Seventh Circuits' rulings) demonstrate why the installment contract approach taken by the District of Columbia and Third Circuits should be upheld as being more consistent with MPPAA's purpose and design.

3. MPPAA does not contemplate automatic acceleration and trustees do not have a fiduciary duty to declare



a default and accelerate the debt within six years of the first missed installment payment. While employers may prepay the debt, Congress envisioned that most employers would amortize a withdrawal liability assessment by making level payments over time, as evidenced by MPPAA's many references to the trustees' payment "schedule." The Seventh Circuit's view that the entire debt automatically accelerates when the first payment is missed or that the trustees must accelerate and file suit to collect the accelerated debt within six years of the first missed payment is inconsistent with the text of MPPAA and fails to appreciate existing constraints on acceleration during the pendency of review and arbitration. Additionally, the Seventh Circuit has misperceived the discretionary nature of MPPAA's default and acceleration provision. Numerous reasons exist why trustees might choose not to accelerate; most importantly, to prevent bankruptcy and to encourage re-entry into the plan.

MPPAA was designed to ensure that withdrawn employers pay their fair share of the plan's liability for unfunded vested benefits ("UVBs"). By misconstruing Section 1451(f)(1) of the statute, the Ninth and Seventh Circuits have impermissibly foreshortened the trustees' ability to collect withdrawal liability and thereby impeded that goal. The accrual dates selected by those courts should therefore be rejected in favor of the more flexible approach of the District of Columbia and Third Circuits, which have ruled that the limitations period does not begin to run until a plan's demand for payment is unmet.

## ARGUMENTS

### I. THE DATE OF WITHDRAWAL IS OF NO SIGNIFICANCE WITH RESPECT TO DETERMINING WHEN A CAUSE OF ACTION TO COLLECT WITHDRAWAL LIABILITY ARISES.

Of the five circuits which have considered Section 1451(f)(1), the Ninth Circuit alone has ruled that the 6-year limitations period begins to run against trustees seeking

to recover unpaid withdrawal liability as of the date of withdrawal. This approach is inconsistent with the text of MPPAA, rulings of this Court and other courts, and the purpose of a limitations period.

In *Board of Trustees of the Constr. Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1361 (1995), which the *Ferbar* panel felt bound to follow, the court ruled that for actions to recover withdrawal liability arising from a complete withdrawal from a construction industry plan, the 6-year limitations period begins to run when the conditions for withdrawal under Section 1383(b) are met; *i.e.*, the employer's obligation to contribute to the plan has ceased *and* the employer has resumed previously covered work within a 5-year period without also resuming the obligation to contribute. The dispositive dates in *Thibodo* lead to the conclusion that the date of withdrawal could not have been intended to be the date on which the trustees' claim for unpaid withdrawal liability accrues.

The Collective Bargaining Agreement ("CBA") expired on June 15, 1983; and in early 1984, the trustees sent the company a notice and demand for payment of withdrawal liability. The employer disputed the assessment, claiming that it had not withdrawn because it had not hired any laborers to perform work in the jurisdiction of the plan following the contract's expiration. The trustees withdrew the assessment, warning the company that it would owe withdrawal liability if it resumed hiring laborers without resuming the obligation to contribute. In the Spring of 1985, almost two years after its CBA expired, the company did resume hiring laborers and the plan reinstated the assessment. A collection action was filed on June 29, 1989, six years and five days after expiration of the CBA. However, the district court stayed proceedings pending arbitration over two issues, one of which was the date of withdrawal. Relying on Section 1383(e), which defines the date of a complete withdrawal for Part 1 of Title IV (*e.g.*, 29 U.S.C. §§ 1381-1405, as



distinct from 29 U.S.C. § 1451(f), which is in Part 6),[6] the arbitrator found that the company had withdrawn on June 15, 1983, as that was the "date of the cessation of the obligation to contribute." Following the arbitrator's decision, the trustees moved to enforce the arbitration award; however, the employer *now* asserted that the action, which had been filed *prior* to arbitration, was barred by the 6-year limitations period triggered by the June 15, 1983, withdrawal, as subsequently determined by the arbitrator. The district court agreed with the employer and dismissed the action.[7]

The court of appeals, troubled by this result, reversed, finding that the company did not completely withdraw until the Spring of 1985, because it was only then that the statutory conditions for a withdrawal in the construction industry were met. The court reasoned that it would

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[6] That Congress did not intend the definition of "date of withdrawal," as set forth in Section 1383(e), to be synonymous with the "act or omission" giving rise to a cause of action under Section 1451, is structurally confirmed by the fact that the definition is expressly limited to Part 1 of MPPAA, which does not include the statute's civil enforcement provision.

[7] The district court's approach turns MPPAA's dispute resolution scheme on its head. If an arbitrator disagrees with the trustees' determination of the date of withdrawal, the principal consequence for the plan under Section 1401(d) of the statute is that the payment schedule may have to be recalculated; for example, if the date determined by the arbitrator falls in a different plan year from the one initially determined by the trustees. In addition, adjustments for overpayments or underpayments may be required. If the employer fails to make payments in accordance with the arbitrator's final decision, Section 1401(d) treats the employer as being delinquent within the meaning of Title I of the statute. In *Trustees of the Amalgamated Ins. Fund v. Sheldon Hall Clothing, Inc.*, 862 F.2d 1020 (3d Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989), the Third Circuit ruled that trustees have six years to enforce an arbitration award (and hence to collect all interim payments that came due pending arbitration and became final). The only basis for dismissal under this scheme would be if the court stayed proceedings pending arbitration, the arbitrator ruled that the employer did not withdraw, and the court agreed under the appropriate standard of review.

be improper for the limitations period to begin to run against the trustees before they acquired a cause of action; *i.e.*, before they even had the right to assess or receive withdrawal liability payments. Significantly, the court stated: "It is anomalous to conclude that the limitations period of § 1451(f) was running against the Trustees before they had a right to sue." 34 F.3d at 917.

However, to avoid this anomalous result, while still adopting a "date of withdrawal" approach, the court simply selected as the date of withdrawal for limitations purposes the earliest date on which the trustees would have had a legal basis upon which to calculate, assess, and collect withdrawal liability generated by a complete withdrawal under Section 1383(b), rather than the date on which the employer's obligation to contribute permanently ceased, in effect, extending the statutory definition for purposes of applying the 6-year limitations period to collections. (The court was apparently not persuaded that Congress could have used the term "date of withdrawal" instead of "act or omission" in MPPAA's civil enforcement provision, but did not do so.)

Distinguishing between these dates of withdrawal, the court noted that the date of withdrawal, defined in Section 1383(e), is "useful" (indeed, necessary) for calculating the amount of an employer's withdrawal liability under Section 1391(b), as the employer's share of a plan's liability for UVBs is predicated on the UVBs existing on the last day of the plan year preceding the year of withdrawal. However, the court found that this definition was not "useful" for purposes of applying the 6-year limitations period to collections because "selection of such a date may involve a considerable amount of relation back," which—the court correctly understood—could severely curtail the trustees' enforcement rights and cause substantial loss to the plan. 34 F.3d at 917. Nevertheless, the court expressly rejected the clear, straightforward, easy-to-apply approach previously suggested by the District of Columbia Circuit; *i.e.*, that the limitations period does not begin to run until a demand for payment goes unmet. The



court rejected this approach on the grounds that this would place the limitations period in the control of the plaintiff and could result in lawsuits being filed years after withdrawal. In this regard, the court failed to consider, or was not convinced, that ERISA's fiduciary duty considerations, independent from limitations constraints, require trustees to act with reasonable speed in assessing and collecting withdrawal liability, particularly since plans are not entitled to additional interest for a belated notice and demand. Therefore, although the court ruled in favor of the plan in the particular case before it, it did so for the wrong reasons and opened the door to confusion and harmful precedent.

Without any further analysis of text or policy, and without giving any consideration to the concerns that led the *Thibodo* panel to modify the statutory definition of the date of withdrawal for purposes of applying Section 1451(f) to collections, the *Ferbar* panel concluded that *Thibodo* was dispositive for all complete withdrawals; *i.e.*, those defined both in Sections 1383(a) and 1383(b). Indeed, the *Ferbar* panel's failure to consider the concerns sought to be addressed by the *Thibodo* panel suggests that the court would also apply the "date of withdrawal" approach to actions to collect liability generated by partial withdrawals under Section 1385, *infra*, although significant "relation back" problems could also exist here that could curtail or eliminate a fund's enforcement rights or could require another "special" rule.

Underlying the Ninth Circuit's approach is the apparent belief that the "act or omission" by which a multiemployer plan is harmed is the employer's "act of withdrawal." However, although plans may be harmed when any employer withdraws, as the plan's contribution base is thereby necessarily diminished, the specific type of harm giving rise to a cause of action to collect withdrawal liability payments cannot occur before the trustees have determined that an employer's *withdrawal* has actually resulted in *liability* and the employer fails to pay it. Indeed, the fact that MPPAA contains various statutory exemptions

itself indicates that the date of withdrawal can have no significance for a judicial proceeding to *collect* withdrawal liability. For example, an employer can meet the statutory criteria for a withdrawal but incur no liability as a result of MPPAA's *de minimis* rule (Section 1389). Or, an employer can withdraw but incur no liability as the result of the sale of assets exemption (Section 1384) or some other mitigating provision of the statute. Or, an employer can withdraw and escape liability for a complete withdrawal because it is part of a controlled group consisting of one or more employers still making contributions to the fund; such an employer may also escape liability for a partial withdrawal as the specific conditions for a partial withdrawal may not have been met. (29 U.S.C. §§ 1301 (b)(1) and 1385.) Thus, as recognized by this Court in *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 115 S. Ct. 981, 988 (1995), "the withdrawing employer owes nothing until its plan demands payment. . . ." Conversely, as withdrawal liability payments have been statutorily designed to make the plan whole for the loss of future contributions necessary to fund vested retirement benefits, the plan is not "adversely affected" within the meaning of Section 1451(a) until an employer "omits" to comply with the trustees' demand for payment—whether in accordance with the installment payment schedule required under Sections 1399(b)(1) and (c)(1)(A), (2), and (3), or for the entire amount due—following a notice of default and acceleration under Section 1399(c)(5).

The Ninth Circuit's "date of withdrawal" approach not only fails to take into account the statute as a whole; it also fails to take into account the realities in which multiemployer plans operate and thereby injects uncertainty into a determination that should be clear and simple both for trustees and employers to weigh their rights and obligations under MPPAA.

In rejecting the installment contract approach suggested by the District of Columbia Circuit in *Sandoz* (which was



subsequently expressly endorsed by the Third Circuit in *Kahle*), the *Thibodo* panel stated:

> In deciding that the limitations period does not begin to run until a demand for payment goes unmet, the District of Columbia Circuit was influenced by the difficulty of determining when an employer had "permanently" ceased to have an obligation to contribute or "permanently" ceased all covered operations, within the meaning of § 1383(a) [citation omitted]. Whatever the difficulties might be under that subsection, we conclude that the construction industry provisions of § 1383(b) do not lead to debilitating uncertainty whether an employer has completely withdrawn.

34 F.3d at 917. Contrary to the panel's belief, trustees may not be readily aware that an employer has permanently withdrawn even in the construction industry. A small multiemployer plan in the construction industry, providing benefits to participants in a limited geographical area covered by CBAs with one or a few local unions, might be expected to be able to track—with relative expediency—whether a former contributing employer has resumed covered operations within five years after the last CBA expired. However, given the migratory nature of construction work (and the relatively complex reciprocal contribution arrangements between funds that also exist), monitoring employers even in a small plan can prove difficult. For larger construction industry funds having employers and participants in more than one state, this task could raise insuperable problems if the trustees must determine that a withdrawal has occurred within a fixed period of time rather than "as soon as practicable"—particularly since ERISA imposes a fiduciary duty on fund trustees to keep administrative costs to a reasonable level so that employer contributions can be invested for the primary purpose of providing benefits. 29 U.S.C. § 1104 (a)(1)(A)(i) and (ii).

Moreover, large multiemployer plans other than those in the construction industry would find it time-consuming,

difficult, and very costly to constantly monitor each employer contributing to the plan. For a plan the size of *amicus* Central States, which has over 9,000 accounts in 42 states and Canada, such constant monitoring could amount to a practical impossibility. In this regard, partial withdrawals, as defined in Section 1385 of MPPAA, present particularly great problems. Section 1385(a)(2) states that a partial withdrawal occurs when there is a "partial cessation of the employer's contribution obligation." Under Section 1385(b)(2)(A), this "partial cessation" occurs either (i) where an employer permanently ceases to have an obligation to contribute under one or more but fewer than all of its CBAs but continues to perform work in the jurisdiction of the contract for which contributions were previously required or transfers the work to another location; or (ii) where an employer permanently ceases to have an obligation to contribute with respect to work performed at one or more but fewer than all of its facilities but continues to perform similar work at the facility. Determining whether an employer is continuing to perform work in a particular jurisdiction or at a particular facility can be extremely difficult and time-consuming, as information pertinent to these inquiries is in the hands of the employer, not the pension plan. Even more difficult is a situation where one member of a controlled group of employers, *infra*, may be shifting work between itself and another controlled group member.

Moreover, as the District of Columbia Circuit recognized in *Sandoz*, the date of withdrawal is likely to be an "unwieldy" accrual date for purposes of applying the 6-year limitations period, not only in the construction industry, and not only because of the difficulty of ascertaining whether and when previously covered work has resumed. Indeed, as great, and perhaps even greater uncertainty may exist with regard to the specific date on which the "obligation to contribute" permanently ceased, as the permanent cessation of the obligation to contribute depends not only on the expiration date set forth in a CBA, but on postexpiration events under applicable labor-



management relations law. 29 U.S.C. § 1392. Indeed, it is only in the simplest case that the date of withdrawal coincides with the nominal expiration date of the CBA. Rather, many other facts often require consideration; for example, whether and for what reason the CBA may have renewed (*e.g.*, automatically, by its own terms, or because of a defective termination notice, or as a result of conduct inconsistent with repudiation); if the contract did terminate, whether bargaining continued and whether and when a permanent impasse was reached; or whether a labor dispute existed and how and when the dispute was resolved—information that is not normally within the purview of the trustees and is ordinarily pinned down either during the pre-assessment investigative process or (if an employer disputes either that it has withdrawn or the date of withdrawal) during administrative review and/or arbitration. The uncertainty surrounding the date on which the obligation to contribute permanently ceases (coupled with the fact that, absent some special rule, "relation back" requirements could eliminate the trustees' ability to collect any withdrawal liability even after prevailing in arbitration), clearly makes the date of withdrawal an inappropriate date for commencing the running of MPPAA's 6-year limitations period. This is illustrated in *Giroux Bros. Transp. v. New England Teamsters & Trucking Indus. Pension Fund*, 73 F.3d 1 (1st Cir. 1996).

In *Giroux*, an employer in the trucking industry made pension contributions to a multiemployer fund pursuant to periodic "supplements" which bound the company to an industry-wide CBA. The last contract was executed in 1981 or 1982. However, the company continued to make contributions without interruption until early 1994, and never notified the fund that it no longer had a contract. When Giroux finally stopped making contributions, the fund issued a standard delinquency notice; the employer responded that it had not had a contract for many years. The fund verified that there was no contract after 1981 or 1982, and assessed withdrawal liability based on a September 1981 withdrawal. The employer sought a judi-

cial declaration that the assessment was barred by the 6-year limitations period as well as an injunction prohibiting the fund from collecting interim payments. Affirming the ruling of the district court in favor of the fund, the Court of Appeals for the First Circuit held that the 6-year statute of limitations applies only to litigation and not to the trustees' notice and demand for payment under Section 1399(b)(1), which requires only that the trustees make a demand "as soon as practicable." In this regard, the court emphasized that an employer wishing to challenge the timeliness of the demand must do so in arbitration. Noting Congress's clear intent that employers should "pay now, dispute later" to protect multiemployer pension plans, the court also refused to enjoin interim payments of withdrawal liability, as the employer was unable to show irreparable harm.

Short-form contracts, such as Giroux's, are common not only in the trucking industry; they are also frequently found in the construction industry and often make it difficult to determine the date of withdrawal. For example, employers may sign only a letter of assent agreeing to be bound by a master labor agreement. Such letters of assent may not contain an expiration date and are intended to survive successor master agreements until such time as an express, written notice of termination is given. While such practice may give rise to collection or labor disputes, and while uncertainty over the duration of the contractual obligation may sometimes result in unfair labor practice charges, the absence of a signed letter of assent, memorandum agreement, or similar short-form contract binding an employer to the then-current master agreement does not ordinarily give rise to an inference that the employer has permanently ceased to have an obligation to contribute where it is industry practice to have this form of CBA, as the First Circuit correctly noted with respect to the trucking industry. However, under the "date of withdrawal" approach adopted by the Ninth Circuit, a fund's belated discovery that the absence of one or more updated short-form agreements was intended to signify the end of the



contractual obligation (and thus the employer's withdrawal) would, in many cases, result in the fund's inability to collect any withdrawal liability. This would be particularly offensive where the employer's own deceptive conduct in making contributions induced a reasonable belief that the employer had not withdrawn.

While a court—even in the Ninth Circuit—might be persuaded to apply the discovery rule of Section 1451(f)(2) where an employer misleads a plan into believing that it had not withdrawn,[8] thereby extending the limitations period for basically equitable reasons, the solution offered by the District of Columbia and the Third Circuits would make a case-by-case analysis (with potentially inconsistent results) unnecessary and should be adopted by this Court. Moreover, as the *Sandoz* court clearly recognized, the discovery rule was not intended to govern routine collection actions, as application of the rule would increase—not reduce—litigation issues, as the employer and trustees dispute who knew, or should have known, what and when. However, unless the approach of the District of Columbia and Third Circuits is adopted, so that the 6-year limitations period begins to run in a consistent manner from the date on which a payment demanded by the plan is due, but not paid, the general rule may well be swallowed by the discovery rule with the result that the 6-year general rule could cease to reflect the balance Congress chose between enforcement and repose. For all of the above reasons, the Ninth Circuit's decision should be reversed.

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[8] The general 6-year limitations period can be extended in appropriate circumstances by § 1451(f)(2), which provides that an action may be brought "3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action" or 6 years in the event of fraud or concealment.

## II. THE "DATE OF WITHDRAWAL" APPROACH CONFLICTS SPECIFICALLY WITH SECTION 1399(b)(1) OF MPPAA, WHICH REQUIRES TRUSTEES TO ISSUE A NOTICE AND DEMAND "AS SOON AS PRACTICABLE" AFTER A WITHDRAWAL, AND WITH SECTION 1399(c)(2), WHICH REQUIRES PAYMENT NO LATER THAN 60 DAYS *AFTER* THE NOTICE AND DEMAND.

In ruling that the statute of limitations commences as of the date of withdrawal, the Ninth Circuit appears to have disregarded two very specific provisions of MPPAA and underestimated the time a multiemployer plan actually needs to determine whether a withdrawal has in fact occurred and to prepare a payment schedule.

As noted earlier, Sections 1383 and 1385 of MPPAA describe the criteria for complete and partial withdrawals, while other provisions of MPPAA describe events which will not necessarily be deemed to be a withdrawal; *e.g.*, a sale of assets, if certain statutory requirements are met (Section 1384); the substitution of one CBA for another (Section 1385(b)(2)(B)); a change in business form, if there is no interruption in contributions (Section 1398(1)); or a labor dispute (Section 1398(2)). In addition, plans may disregard transactions that are designed primarily to evade or avoid withdrawal liability (Section 1392(c)). As discussed in connection with the specifics of the trucking and construction industries, *supra*, it is often difficult for a plan to determine the *permanent* cessation of the obligation to contribute or the *permanent* cessation of covered operations. It is frequently even more difficult and time-consuming for plans to determine the existence of a *bona fide* statutory exemption, as well as the converse, that what appeared to be a *bona fide* transaction was really a transaction to evade or avoid withdrawal liability, because much of the most relevant information is ordinarily not within the trustees' possession. Moreover, these difficulties are compounded by the statutory definition of "employer."

For all purposes of withdrawal liability, Section 1301(b)(1) of ERISA treats as a "single employer" all trades



and businesses under common control as prescribed in regulations applicable to Section 414(b) of the Internal Revenue Code. The existence of a controlled group is of critical importance in determining whether a withdrawal has occurred and, if so, whether it is a complete or partial withdrawal. However, as many contributing employers are relatively small close corporations, sole proprietorships, or partnerships, and not publicly-traded companies, this information is particularly difficult for trustees to obtain. Many plans—at the pre-assessment stage—send employers questionnaires (sometimes captioned a "statement of business affairs") requesting very specific information concerning the ownership interests of the company and its principals to ascertain the commonality of such interests in related enterprises. All too frequently, these questionnaires are not answered completely or correctly, or are not answered at all, both because the controlled group rules are highly technical and complex and because some employers are unwilling or unable to provide the information that is most relevant. Indeed, many employers are not aware that a variety of the activities in which the company or its owners engage are viewed as "trades or businesses" under applicable law.

Given ERISA's prudence concerns, trustees will be loath to expend fund assets issuing a notice and demand and engaging in administrative review and often costly arbitration prior to investigating a potential withdrawal liability claim with due diligence, as they will wish to be at least reasonably certain that the employer has been correctly identified and that no statutory exemptions exist.[9]

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[9] Even after a plan acquires information leading it to conduct further investigation, the determination of whether and when a withdrawal occurred can involve complex and difficult fact-finding. An employer who files for bankruptcy liquidation seemingly presents the prototypical example of an "easy" determination of withdrawal. Frequently, however the employer will be using employees, for example, truck drivers, to marshal assets for liquidation. Thus, although the employer may seem to have ceased reporting any obligation to the plan following the bankruptcy, bargaining unit

Moreover, if a notice and demand is made prematurely, as the result of an insufficient inquiry, courts may enjoin the assessment and impose sanctions against the plan; *e.g.*, attorney fees.[10]

Finally, even when a plan is able to secure all of the information described above, the process of preparing a notice and demand takes a significant amount of time, as the statutory formulae for calculating withdrawal liability and preparing a payment schedule are very complex and may also depend on information that is not immediately available from the plan's own records, the plan's actuary, or from other sources.[11]

Knowing of these difficulties, which can be more or less significant in different industries, Congress did not direct trustees to notify employers of their withdrawal and make a demand for payment either immediately following the event or within some fixed time. Rather, Section 1399 (b)(1) requires plan sponsors to issue a notice of liability and demand for payment "as soon as practicable after an employer's complete or partial withdrawal"; correspondingly, Section 1399(c)(2) requires employers to begin making the payments demanded, in accordance with the trustees' payment schedule, no later than 60 days *after* the date of the demand, notwithstanding administrative challenges to the assessment; *e.g.*, a request for review, appeal of the trustees' determination, and arbitration.

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work is still being performed. Accordingly, a complete withdrawal has not occurred.

[10] *T.I.M.E.-DC, Inc. v. I.A.M. Nat'l Pension Fund*, 597 F. Supp. 256 (D.D.C. 1984) (plan enjoined from enforcing notice); *T.I.M.E.-DC, Inc. v. I.A.M. Nat'l Pension Fund*, 616 F. Supp. 400 (D.D.C. 1985) (attorney fees awarded against the plan).

[11] Commonly, actuarial valuations containing the applicable UVBs are not available for at least six months after the end of a plan year. Thus, for example, the UVBs needed to compute the withdrawal liability for an employer that withdrew in January 1997 may not be available until June 1998 or later. Plan audits, which may also affect the calculation, may also not occur until months after the end of a plan year.



As this Court recognized in *Schlitz, supra*, the interval between the date on which an employer effects a statutory withdrawal and the date on which a plan sponsor issues a notice and demand for payment can be quite substantial (without, for that reason, being objectionable). Under the Ninth Circuit's ruling, however, the time needed to properly investigate the facts and prepare a notice and demand that must be reasonably correct (given the statutory presumptions favoring the determinations of the plan's trustees and actuary)[12] is held against the trustees and curtails their collection rights. The Ninth Circuit's approach simply cannot be squared with the fact that Congress contemplated that the primary mode of payment would be in level installments, as determined under Section 1399(c)(1)(A), and that payment schedules exceeding six years' duration are exceedingly common and, in fact, may be cut off only after the end of 20 years. Nor can it be squared with *Schlitz, supra*, in which this Court stated that "the statute . . . might make the withdrawing employer pay (or begin payment) on the date the employer actually withdraws. But it does not do so." 115 S. Ct. at 987.

Finally, although the Ninth Circuit in *Thibodo* rejected the District of Columbia Circuit's installment contract approach because it was loath to allow the trustees to "control" the statute of limitations, under the Ninth Circuit's approach, it is actually employers who can manipulate the limitations period so as to deprive plans of all or most of the liability owed. For example, all the employer would need to do to exhaust the statute of limitations is to substantially comply with the payment schedule for a period of time which, when combined with the interval between the date of withdrawal and the date the first payment was due, equals six years. After that time, the employer could stop making installment payments with impunity; as the 6-year limitations period would have

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[12] *See Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (MPPAA's statutory presumptions upheld as constitutional).

run on the trustees' single claim, they could collect neither future installments nor accelerate and collect the remaining debt. A similar result could be achieved by "curing" intermittent delinquencies so as to preclude acceleration during the 6-year period available for collection. Although to a somewhat lesser extent, the Seventh Circuit's *Navco* approach could lead to a similar foreshortening of the trustees' statutory enforcement rights, and for that reason should also be rejected, as we will now show.

## III. MPPAA DOES NOT CONTEMPLATE AUTOMATIC ACCELERATION AND TRUSTEES SHOULD NOT BE REQUIRED TO ACCELERATE WITHIN SIX YEARS OF THE FIRST MISSED INSTALLMENT.

In *Navco*, the Seventh Circuit ruled that the trustees' single claim for withdrawal liability accrues on the date the first installment payment is missed because the entire amount is presumptively due on that date. Although the opinion is not entirely clear on this point, it can be read to mean that the debt automatically accelerates at this time. However, even if acceleration is not automatic, trustees have only six years from the date of the first missed payment to declare a default, accelerate the debt, and file a lawsuit to collect the entire amount due. In contrast to the District of Columbia and Third Circuits, the Seventh Circuit's presumptive acceleration approach misperceives the essential features of the payment structure Congress selected. Additionally, the court failed to appreciate existing restraints on trustees' enforcement rights as well as the discretionary nature of MPPAA's default and acceleration provision.

As this Court recognized in *Schlitz, supra*, Congress envisioned that employers would amortize the debt in level payments (roughly related to the amount of their former contributions) over time, indeed, for up to 20 years. While employers may repay the assessment and thereby avoid or reduce interest, many (if not most) employers cannot afford to do so. Not surprisingly, Section 1399, "Notice, collection, etc., of withdrawal liability," is replete with references to the trustees' payment *schedule*, with which employers must comply no later than 60 days after the date of the notice and demand, whether or not review is requested. Likewise, Section 1401, "Resolution of disputes," anticipates payment in accordance with the trustees' *schedule*, both pending and after arbitration. With regard to the trustees' enforcement rights, however, a critical distinction exists, depending on whether or not the employer has sought review and initiated arbitration.



If the employer fails to request a review or fails to initiate arbitration, it waives the right to contest the assessment, and the amount demanded by the trustees is due and owing as set forth in the trustees' payment schedule. Consequently, if these payments are not made, the trustees may file suit to collect the delinquent installments in accordance with Section 1401(b)(1). In addition, the trustees may declare the employer in default and accelerate the debt under Section 1399(c)(5)(A).

For purposes of Section 1399(c)(5)(A), the term "default" means the failure to make a payment when due if that failure is not cured within 60 days of the date on which the employer received written notification of the failure. Significantly, MPPAA's default provision is not self-executing. Rather, to put the employer in default, the trustees must first notify the employer of its failure to have made a required payment and then permit the employer 60 days in which to effect a cure.

If the employer has requested review and initiated arbitration, the trustees—under an operative PBGC regulation—have *no discretion* whether or not to declare a default and accelerate the debt during the period the employer has for contesting the assessment.[13] Rather, 29

[13] Most plans and nearly every federal court has followed this regulation. The trustees' inability to declare a default and accelerate during the review period is one basis upon which the PBGC as well as numerous plans have argued that the "pay now, dispute later" structure of MPPAA is not unconstitutional. *See United*

C.F.R. § 4219.31(c)(1) (1996) provides that a default cannot occur earlier than 61 days after the employer's time to contest the assessment has expired. If an employer fails to make one or more "interim payments" prior to the arbitrator's decision, which is the last possible event in the nonjudicial dispute-resolution scheme, the trustees may assess interest on that payment (or on any other missed installments) and file suit to collect the amounts due. However, they are not permitted to accelerate and collect the entire debt at this time. (It may be noted that, depending on particular facts and circumstances, many trustees may make a business judgment not to pursue an action to collect interim payments in federal court during the pendency of arbitration, as they do not wish to undertake the costs of proceeding in two forums at the same time in the absence of a statutory requirement to do so.)

Moreover, even when the trustees' payment schedule has become final, whether in the absence of arbitration or after the arbitrator has issued an award, the trustees have complete discretion to continue to pursue only the installments set forth in the schedule. Significantly, Section 1399(c)(5) states only that "in the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability. . . ." (Emphasis added.) The discretionary nature of MPPAA's default provision is further confirmed by PBGC regulation 29 C.F.R. § 4219.31(b)(2) (1996), which states that upon default, the trustees are free to accelerate (if they so desire) only a portion of the withdrawal liability. Under the Seventh Circuit's ruling, however, the trustees would have no discretion whether or not to declare a default, particularly if the decision is meant to suggest that the debt automatically accelerates when the first

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***Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.***, 787 F.2d 128 (3d Cir. 1986), ***aff'd by an equally divided Court***, 481 U.S. 735 (1987). One court has recently invalidated the regulation. ***Central States v. Century Motor Freight***, 1995 WL 699655 (W.D. Ill. Nov. 22, 1995).



installment payment is missed. Moreover, even if acceleration is not automatic and trustees have up to six years from the date of the first missed installment to declare a default and sue to collect the accelerated debt, the loss of discretion not to accelerate raises serious problems for multiemployer plans.

Of particular concern to the NCCMP is the belief implicit in the Ninth and Seventh Circuits' decisions that trustees have a fiduciary duty to accelerate an employer's withdrawal liability debt. On the one hand, such a fiduciary duty could place the trustees in the anomalous position of being required to accelerate the debt without having the ability to enforce a demand for full payment in the event the employer has requested review and initiated arbitration. On the other hand, even if enforcement problems did not exist, a fiduciary duty to accelerate within six years of a first missed payment would interfere with the trustees' ability to make and implement a business judgment that acceleration would not be in the best interests of the plan.

A number of reasons exist why trustees might determine that it would *not* be in the plan's best interest to accelerate and demand payment of the entire debt, at least until such time as the prospect of receiving installment payments becomes substantially unlikely. First, an employer having financial difficulties may attempt to comply with the trustees' payment schedule, but may make its payments late and also at sporadic intervals. In such circumstances, acceleration of the withdrawal liability debt and a demand for full payment would likely prompt the employer to seek protection under the Bankruptcy Code. Depending on the size of withdrawal liability debt and the nature and size of the debts of other creditors, the plan could stand to recover little or nothing on its withdrawal liability claim. Therefore, the trustees might determine that it would be more prudent to try to collect as many installments as possible in anticipation that bankruptcy can be avoided or, at least, postponed until such time as a substantial number of installments have already been collected. Alter-

natively, although an employer's financial situation and payment practices might ultimately prompt trustees to determine that it would be best to accelerate the debt, even at the risk of bankruptcy, the desirability of exercising this option might not become apparent within six years of the first missed installment. Moreover, in this intervening time, the trustees could become aware of the existence of a solvent member of a controlled group which would reduce the risk of nonpayment in bankruptcy.[14] These plan-protective options would be severely restricted under *Navco*.

Additionally, Section 1399(c)(5)(B) allows plans to adopt rules permitting the trustees to accelerate a withdrawal liability debt where events other than nonpayment indicate a substantial likelihood that an employer will be unable to pay its withdrawal liability. Events such as the employer's insolvency, dissolution, or loss of a license to do business could trigger a default under this section; however, these events, too, might not occur within six years of the first missed installment payment. However, by then it would be too late for the plan to act.

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[14] The single accrual date selected by both the Ninth and Seventh Circuits not only eviscerates a fund's ability to protect itself from a default, should one occur due to missed installment payments occurring more than six years after the date of withdrawal or the first missed payment, it also forces a fund to expend substantial resources conducting investigations that are unnecessary at the time the employer is assessed. For example, if a fund assesses the known members of a controlled group, and at least one member of the group begins to pay in a timely manner and has also been reasonably determined to be financially capable of satisfying the entire debt, the fund would ordinarily forego searching for additional controlled group members, which can be quite costly. However, given the statute of limitations constraints imposed by the above courts, funds in those circuits may feel compelled to undertake this costly and difficult search for unknown members of the group at the outset, even though it may never be necessary for the fund to proceed against those persons or entities. Adoption of the installment contract approach would prevent a potential waste of fund assets.



Further, a rigid, single 6-year limitations period could deprive trustees of flexibility in dealing with withdrawn employers who may be considering re-entering the plan for a variety of reasons under MPPAA's re-entry and abatement rules. Acceleration of the debt could chill the employer's business efforts as well as negotiations between the bargaining parties. Indeed, acceleration could remove an important incentive for re-entry. Additionally, negotiations for a new CBA could take a substantial amount of time; in the event negotiations failed, it could well be too late for the trustees to accelerate.

Finally, as noted earlier in connection with the Ninth Circuit's "date of withdrawal" approach, an employer could manipulate an inflexible limitations period by curing intermittent delinquencies, or by making payments on schedule until the limitations period expires, and then stop, leaving a plan without the ability to collect the balance of the debt.

In sum, there is no basis for the notion that MPPAA contemplates automatic acceleration or that trustees have a fiduciary duty to accelerate the debt within six years of the first missed installment payment. As the District of Columbia Circuit indicated in *Sandoz* and the Third Circuit indicated in *Kahle*, a foreshortening of the trustees' collection rights would be inimical to the policies animating MPPAA, particularly as other incentives exist to encourage plans to act with reasonable diligence.

## CONCLUSION

The fundamental purpose of MPPAA was to establish a mechanism by which employers withdrawing from multiemployer plans continue to pay their fair share of the plan's liability for UVBs. To effectuate this goal, the District of Columbia and Third Circuits have suggested an installment contract approach that is consistent with the text of MPPAA, easy to apply, and fairest to plans without prejudicing employers. For the reasons stated above, the NCCMP and Central States urge this Court to adopt the approach of these courts and to rule: that trustees have six years from the date of any missed installment payment to collect that payment; that trustees have discretion to accelerate the debt at any point along the payment schedule; and that if the trustees do elect to accelerate, the 6-year limitations period begins to run from the date the accelerated debt is due.

Respectfully submitted,

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